LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 30 1962
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

October Term, 1962

VULCAN MATERIALS COMPANY, PETITIONER

v.

ROBERT J. LARSEN, DISTRICT DIRECTOR OF INTERNAL REVENUE and D. J. LUNSFORD, ACTING DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

LOUIS F. OBERDORFER,
Assistant Attorney General,

MELVA M. GRAHAM,
Attorney,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

October Term, 1962

No. 486

VULCAN MATERIALS COMPANY, PETITIONER

v.

ERNEST J. SAUBER, DISTRICT DIRECTOR OF INTERNAL REVENUE and D. J. LUIPPOLD, ACTING DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question in this case is whether the court below correctly held that, for percentage depletion purposes, two of the taxpayer's mineral deposits are "dolomite" rather than "chemical grade limestone" or "metallurgical grade limestone." Section 114(b)(4)(A) of the Internal Revenue Code of 1939 provides in part that the allowance for depletion shall be:

"(i) in the case of * * * stone * * * 5 per centum,
(ii) in the case of * * * dolomite, magnesite * * * calcium carbonates, and magnesium carbonates, 10 per centum,
(iii) in the case of * * * metallurgical grade limestone, chemical grade limestone * * * 15 per centum * * * of the gross income from the property during the taxable year * * * *"

Dolomite was added to the list of minerals subject to percentage depletion simultaneously with chemical and metallurigal grade limestone and several other minerals. See Section 319 of the Revenue Act of 1951, c. 521, 65 Stat. 452; S. Rep. No. 781, 82d Cong., 1st Sess., p. 38. In adding those minerals, Congress indicated that the mineral classifications were intended to have their "commonly understood commercial meaning" (S. Rep. No. 781, *supra*, p. 38; see, also, H. Conf. Rep. No. 1213, 82d Cong., 1st Sess., p. 77) and, recognizing that there was some overlapping in the statutory mineral classifications, that a specific classification should control over a more general classification (H. Conf. Rep. No. 1213, *supra*, p. 77).

In the trial court the taxpayer stipulated (R. 18) that the two deposits in issue contain 43 percent magnesium carbonate, that they are "dolomite," and that they are "commonly known as such." The taxpayer argued, however, that it is improper to classify the minerals listed in the statute according to their commonly understood commercial meanings. It also contended that the mineral deposits should be classi-

fied as chemical or metallurgical grade limestone because (1) "dolomite" is a "limestone" in the broad sense, although admittedly a more specific classification; and (2) this particular dolomite is of a grade suitable for chemical and metallurgical uses. The court below, sustaining the trial court, held (1) that the pertinent legislative history and judicial precedent establish that the listed minerals are to be given their commonly understood commercial meanings (Pet. 22-23); (2) that the evidence supports the trial court's findings that "dolomite" is commercially known as a stone with a high magnesium carbonate content, in contrast to "limestone" which is a term customarily used to embrace all other carbonate rock (Pet. 24-25); and (3) that, since "dolomite" is a more specific classification than "limestone" and since Congress has provided only a single depletion rate for dolomite regardless of whether or not it is suitable for chemical and metallurigal uses, the percentage rate of depletion for the taxpayer's mineral deposits is the 10 percent provided for "dolomite" (Pet. 25-27).

There is no occasion for further review of the case. The decision below is correct and in accord with the Sixth Circuit's recent opinion in a substantially identical case, *Erie Stone Co.* v. *United States*, 304 F. 2d 331, in which a petition for certiorari is pending (No. 388, October Term, 1962). There is no conflict * and

* The taxpayer asserts (Pet. 6) that the decision below is in conflict with the Sixth Circuit's opinion in *United States* v. *Wagner Quarries Co.*, 260 F. 2d 907. In *Erie Stone Co.* v. *United States*, *supra*, a case substantially

the issue does not arise under the 1954 Code, since Section 613(b)(6) prescribes the same percentage rates of depletion, dependent upon the purpose for which the mineral is sold or used, for both dolomite and limestone of all grades.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

MELVA M. GRANEY,
Attorney.

OCTOBER 1962.

---

identical to the present one, the Sixth Circuit itself found no conflict with *Wagner Quarries*. The District Court's opinion in *Erie Stone*, 181 F. Supp. 942 (N. D. Ohio), fully explains the difference between *Wagner Quarries* and the present case.

U. S. GOVERNMENT PRINTING OFFICE 1962 663612